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SUPREME COURT OF THE UNITED STATES

October Term, 1941

NO. 972

DAVID O'BRIEN, *Petitioner*

vs.

PABST SALES COMPANY, *Respondent*

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable, The Supreme Court of the United States:

Comes now Pabst Sales Company, hereinafter styled Respondent, and, replying to the application for writ of certiorari on file herein, respectfully shows:

OPINIONS OF CIRCUIT COURT OF APPEALS

The majority and minority opinions of the Circuit Court of Appeals are found in the Record at pages 68 to 76.

JURISDICTION

The Supreme Court should not take jurisdiction of this case (a) because there is no conflict of authority upon any important question of law involved herein; (b) because there is no conflict between the majority and the dissenting opinions of the Circuit Court of Appeals herein, the majority opinion specifically refraining from expressing any opinion on the matter dealt with in the dissenting opinion; (c) because at all events the case was correctly decided upon its undisputed facts; and (d) because the case does not involve any disputed question of law possessing great public importance.

QUESTIONS PRESENTED

1. Whether the respectful publication of the photograph of a famous public character of national notoriety in connection with an advertisement containing no false statement is actionable.

2. Whether such public character has a cause of action for such reproduction of his photograph where he has posed for such photograph for publicity purposes and has, in fact, expressly and impliedly authorized Texas Christian University to distribute such photograph to the public generally without limitation upon its use, and where the photograph in question was in fact obtained from Texas Christian University and paid for in regular course without limitation upon its use.

3. Whether under the law of Texas Petitioner can recover for mere embarrassment or injured feelings, there being no pleading or proof of any injury to his person, property, or reputation.

STATEMENT OF THE CASE

(a) The basis of Petitioner's suit is an alleged invasion of his right of privacy. (R. pp. 1-5). As stated in the majority opinion (R. p. 73), throughout the pleadings, record and brief, Petitioner has uniformly stood on the position that his suit is for invasion of privacy. The theory of quantum meruit is not, in fact, the case brought and pursued by Petitioner, but is suggested for the first time in the minority opinion. The majority opinion expressly refrains from expressing any opinion on the matter dealt with in the dissenting opinion (R. p. 73), and there is, therefore, no real conflict between the two opinions upon any important question of law.

(b) Petitioner was a famous public character of nationwide notoriety, being the outstanding and most publicized football player of the year 1938-39. In 1938 he was generally recognized as the leading college football player of the year and thereafter continued his football career as a professional player. Petitioner, who testified fully by deposition, recited in detail his fame and his numerous national trophies and awards, including among others several as the outstanding football player of the United States, membership on nearly every All-American football

team of the country, including the famous Grantland Rice All-American team depicted on the calendar in question, and also a plaque as the best football player that ever lived. His name and picture appeared universally in the newspapers, magazines and sports journals of the nation. (R. pp. 1-3, 4-6, 9, 10, 21, 26-30, 50, 51, 57-59.)

(c) Petitioner expressly and impliedly authorized the distribution of the pictures in question to the public generally without restraint as to their use. During the four years that Petitioner attended and played football there, Texas Christian University maintained under its jurisdiction a publicity department, called the "News Service." The functions of said publicity department were to furnish facts, stories, and information concerning football activities of the University team, and pictures and biographical data concerning the players to news services, newspapers, magazines, football fans, or any member of the public who might ask for same, and no questions were asked as to what was wanted with the picture and no restrictions were placed upon the use to be made of same. This publicity promotion was good for the school, the team, and the individual players, the testimony being that such publicity is a help to the individual football player because it brings him credit in the public eye, and that in recent years, in the development of professional football, it has had considerable bearing on the player's opportunities in that field. This publicity department alone furnished more than 700 or 800 photographs of petitioner with biographical data to

various nationwide press associations, sports editors, magazines, and members of the public, all for publicity purposes. Petitioner posed for numerous football pictures for publicity purposes, including the very pictures on the calendar in question, and numerous similar pictures. Petitioner was familiar with the activities of said publicity department, and expressly and impliedly authorized same. (R. pp. 26-30, 50-52, 57-61). The pictures of Petitioner appearing on the calendar in question were obtained by writing to said publicity department and paying for same in regular course. No restriction whatever was placed upon the use of same. (R. pp. 35-47).

(d) Petitioner complains that Respondent used his picture in football uniform on what is known as the "Pabst Blue Ribbon Football Calendar of 1939." His picture appeared thereon by reason of his having been selected a member of the famous Grantland Rice All-American Football Team of 1938, the pictures of other members of said team likewise appearing thereon. Being the most famous collegiate football player of the year, Petitioner was given prominence on the calendar by placing his picture in his famous and characteristic pose of executing a forward pass in the upper left-hand corner of the calendar. The bulk of the calendar was taken up with an elaborate schedule of football games played by the most prominent collegiate teams of the country in the season of 1938 (with scores) and to be played by such teams in the season of 1939 (with blanks for scores to be inserted). Also, the

calendar contained a schedule of the National Football League for the season 1939. A bottle of Pabtst beer and a can of Pabst beer were pictured on one corner of the calendar, and the name "Pabst Blue Ribbon Beer" appears on the margin at the top and bottom of the calendar. The calendar is a special kind of calendar—a football calendar. Perhaps nine-tenths of its space and content is devoted to football. (R. p. 37). The calendar contains no false or libelous statement. It contains no endorsement of Pabst beer by Petitioner or any other member of the team. It contains no commendation of the beer at all. It does not say that Petitioner or any other member of the team drinks Pabst beer. It merely publishes a schedule of football games. By distributing same, Respondent was simply seeking to promote good will by courting the favor of the vast football public, and in effect was merely saying, "Here is a football calendar with the compliments of Pabst." There is no evidence in the record that any human being was led to believe by the calendar that Petitioner either endorsed or drank Pabst beer. (R. 6, 37).

(e) No injury is pleaded or proven to Petitioner's person, property or reputation. The only evidence of any injury to him is his assertion that he was "embarrassed and humiliated" when he saw the calendar. (R. pp. 1-5, 15, 22, 23, 24).

ARGUMENT

First Question Presented

See majority opinion of the Circuit Court of Appeals (R. p. 68) which for brevity we do not quote.

It is true the authorities are in conflict as to whether there exists at common law a cause of action for the mere invasion of the privacy of a private person. Petitioner claims a majority of the states on his side, but some half dozen of the states and some twelve of fourteen of the authorities listed by him do not in fact support this claim. See Note 1.

NOTE 1. Petitioner confuses cases easy to find in the books, such as **Edison v. Edison Polyform Manufacturing Company,** 67 A. (N. J.) 392; **Foster-Milburn v. Chinn,** 120 S.W. (Ky.) 364, where the publication of the photograph contained false statements or forged endorsements; or such as **Metter v. Los Angeles Examiner,** 95 P. (2d) 491; **Levyeau v. Clements,** 56 N.E. (Mass.) 735; **Bazemore v. Savannah Hospital,** 155 S.W. (Ga.) 194, where the photograph was surreptitiously obtained, or its reproduction constituted a breash of contract or of fiduciary obligation; or such as **Lahiri v. Daily Mirror,** 295 N.Y. Sup. 388; **Fisher v. Rosenberg,** 23 N.Y. Sup. (2d) 677, in which recovery is based upon an express statute specifically creating the cause of action; or cases such as **Melvin v. Reid,** 297 P. (Cal.) 91; **Mau v. Rio Grande Oil Co., Inc.** 28 Fed. Sup. (Cal. Dist. Ct.) 845; **Metter v. Los Angeles Examiner,** supra, where recovery was based upon express provision of the state constitution creating the cause of action; or where, as in **Itzkovitch v. Whitaker,** 39 So. (La.) 499; **Vanderbilt v. Mitchell,** 63 A. (N. J.) 1107; **Edison v. Edison Polyform Manufacturing Co.,** supra; **Melvin v. Reid,** supra; **Holloman v. Life Insurance Company of Virginia,** 7 S. E. (2d) (S. C.) 169; and **Themo v. New England Newspaper Publishing Co.,** 27 N.E. (2d) (Mass.) 753, no right of privacy was involved at all, or where for any of the above or other reasons the court expressly declined to decide whether such a cause of action exists at common law. Thus there remains on Petitioner's side of the above question only the states of Georgia, Kansas, Kentucky, Missouri, North Carolina, and South Carolina (by dictum). In all cases cited by Petitioner from said states except **Foster-Milburn v. Chinn,** supra, (forged endorsement), Plaintiff was a private person and not a public character. Hence, Petitioner's cases do not govern this case.

On the other hand, New York, Rhode Island, Washington, Michigan, and Wisconsin expressly rejected the existence of a common law cause of action for the invasion of the mere privacy even of a private person,

However, the above conflict of authority is academic because there is no conflict of authority upon the question actually involved in this case. States which accept as well as those which reject the common law privacy doctrine all uniformly deny its application where complaining party is a public character of national notoriety or has expressly or impliedly invited or consented to publicity. We have discovered no case in which the court has applied the common law privacy doctrine to a public character having a national reputation. Among the decisions recognizing the public character exception are many of the decisions cited by Petitioner, as well as others. See *Corliss v. E. W. Walker*, 64 F. (Mass.) 280; *Sidis v. F-R Publishing Corporation*, 113 F. (2d) 806, (certiorari denied by the United States Supreme Court in 85 L. Ed. 279); *Jones v. Herald Post Co.*, 18 S.W. (2d) (Ky.) 972; *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68; *Edison v. Edison Polyform Manufacturing Co.*, supra; *Themo v. New England Newspaper Publishing Co.*, supra; *Melvin v. Reid*, supra; *Metter v. Los Angeles Examiner*, supra; *Munden v. Harris*, 134 S. W. (Mo.) 1076; *Brents v. Morgan*, 299 S.W. (Ky.) 967; *Hanna Manufacturing Co. v. Hillerich & Bradsby Co.*, 78 F. (2d) 763 (certiorari denied by the United States Supreme Court 80 L. Ed. 458); *Para-*

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and California and Massachusetts have specifically expressed doubt as to the existence of such common law cause of action. See **Roberson v. Rochester Folding Box Co.**, 64 N. E. (N. Y. C.C.A.) 442; **Henry v. Cherry & Webb**, 73 A. (R. I.) 97; **Hillman v. Star Publishing Co.**, 117 P. (Wash.) 594; **Atkinson v. John E. Doherty & Co.**, 80 N. W. (Mich.) 285; **Judevine v. Benzies-Montayne Fuel & Warehouse Co.**, 269 N. W. (Wis.) 295. The rule in Texas is undetermined either by decision or statute.

mount Pictures v. Leader Press, 24 F. Sup. (Ok.) 1004; *Vassar College v. Loose-Wiles Biscuit Co.*, 197 F. (Dist. Co. Mo.) 982.

And the fact that the name and picture of the famous character were used in connection with an advertisement—that is to say, were used to lend interest and attractiveness to a football calendar intended to promote good-will for Respondent's product—does not give rise to a cause of action, provided the publication does not contain any false statement. Thus in thirteen of the authorities above mentioned, to wit: *Roberson v. Rochester Folding Box Company; Henry v. Cherry & Webb; Atkinson v. John E. Doherty & Co.; Pavesich v. New England Life Insurance Co.; Corliss v. E. W. Walker Co.; Munden v. Harris*; *Sidis v. F-R Publishing Corporation; Hanna Manufacturing Co. v. Hillerich & Bradsby Co.; Paramount Pictures v. Leader Press; Melvin v. Reid; Themo v. New England Newspaper Publishing Co.; Vassar College v. Loose-Wiles Biscuit Company;* and *Edison v. Edison Polyform Company*, the name or picture was used for advertising or commercial purposes, or for the purpose of business gain. The first three of said decisions were decided in jurisdictions which reject the privacy doctrine; the remaining ten in jurisdictions which recognize, or are claimed by Petitioner to recognize, the privacy doctrine. Yet even in the latter cases the above stated exception with respect to a public character is uniformly and explicitly recognized.

The minority opinion erroneously assumes that the mere use of the picture in connection with an advertisement creates a cause of action even though the subject of the picture is a national public character and the advertisement contains no false statement.

It is uniformly held that where, as here, Petitioner by his activities over a period of years sought and invited the interest, applause and patronage of the public and became a public character of national notoriety, his name and picture became, so to speak, a public possession and he no longer retained the right of an ordinary private person to the exclusive use of his picture, and any member of the public had a right to reproduce same provided, as in this case, the reproduction contained no libel or false statement, and the picture was not obtained surreptitiously or reproduced in breach of any contract or fiduciary obligation; and the fact that the name and picture of such famous character are used in connection with an advertisement, that is, to lend interest and attractiveness to a calendar intended to promote good-will for Respondent's product, does not make a case.

Petitioner complains, however, that Respondent is engaged in the business of selling beer, and that the calendar was hung in some saloons. A football star whose likeness has become the possession of the public, cannot choose what members of the public may reproduce it, or the place where its reproduction may be hung. Respondent is as much privileged to reproduce it as would be the Coca Cola Company,

or the manufacturer of Wheaties, "the food of champions," or any other member of the public. The pictures of the President may be found in many saloons. Yet this could not be regarded as a disrespect or as a representation that the President is a beer addict or that he endorses the product of that saloon. The calendar contains no endorsement, express or implied, by the members of the team depicted thereon. In fact, the calendar contains no commendation of the beer by any one at all. And there is no evidence in the record whatever that any human being concluded from the picture that the Petitioner endorsed Pabst beer or was a Pabst beer drinker.

Second Question Presented

The undisputed evidence is that Petitioner expressly and impliedly authorized the distribution of his picture by Texas Christian University, and that is where the pictures in question were obtained. There was no restriction on the authority of the University to distribute the pictures, and no restriction was placed upon the use of same when obtained from the University. See subdivision (c) of Statement of the Case herein. This is a complete, independent defense regardless of any other question in the case, and is entirely overlooked in the minority opinion.

Third Question Presented

No injury to Petitioner's person, property, or reputation, and no actual damages of any character are pleaded or proven. The Texas decisions incontestably establish the rule in Texas that in a case of this character there can be no recovery for mere embarrassment or injured feelings. See *Gulf, Colorado & Santa Fe R. R. Co. v. Trott*, 25 S.W. (Tex. Sup. Ct.) 419; *Davis v. Grantham*, 295 F. (5th Circuit), 132; *Williams v. Yoe*, 46 S.W. (Tex. Civ. App.) 659; *Michels v. Boruta*, 122 S.W. (2d) (Tex. Civ. App.) 216; *State National Bank of Iowa Park v. Rogers*, 89 S.W. (2d) 825; *Ferguson v. Houston Press Co.*, 1 S.W. (2d) (Tex. Civ. App.) 387, affirmed 12 S.W. (2d) 125.

CONCLUSION

There is no real conflict of authority upon any important question of law actually involved in this case. In any event, the case was correctly decided upon its undisputed facts.

Respectfully submitted,

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